No. 87-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,
Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF ELECTRIC UTILITY COMPANIES AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In accordance with this Court's Rule 36, the domestic electric utility companies (the "Utilities") listed below [1]

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[1] The Utilities include:

Alabama Power Company
Arkansas Power & Light Company
Duke Power Company
Georgia Power Company
GPU Nuclear Corporation
Houston Lighting & Power Company
Kansas City Power & Light Company

[Continued]

have received the written consent of the parties to file this brief as *amici curiae*. Copies of the consents have been filed with the Clerk.

INTRODUCTION

Section 161v of the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* (1982 & Supp. III 1985), provides that the Atomic Energy Commission, now the Department of Energy ("DOE" or the "Department"):

> *to the extent necessary to assure the maintenance of a viable domestic uranium indusdry*, shall not offer [uranium enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States.

42 U.S.C. § 2201(v) (1982) ("section 2201(v)") (emphasis added). Section 170B requires the Secretary of DOE to submit an annual report on the viability of the domestic uranium mining and milling industry to the President and to the Congress. 42 U.S.C. § 2210b(a) (1982). On September 26, 1985, the Secretary of DOE issued a determination that the domestic uranium industry was not viable in calendar year 1984. Memorandum for The President from DOE Secretary John S. Herrington (Sept. 26, 1985). Nevertheless, DOE did not impose enrichment restrictions on foreign-origin uranium under section 2201(v): the Department concluded that such restrictions would not assure the viability of the domestic industry, and, in that circumstance, enrichment restrictions were not required by statute. *See* 51 Fed. Reg. 3624, 3627 (1986).

The Respondent domestic uranium mining and milling companies in this case claim that section 2201(v) requires DOE to impose restrictions automatically upon a finding that the domestic industry is not viable. The District Court below agreed, and issued an injunction that would have required DOE to limit its enrichment of foreign uranium to 25% of all materials enriched between June 6, 1986 and December 31, 1986, and to refuse to enrich any foreign uranium after January 1, 1987. Petition at 23a. On appeal, the Tenth Circuit upheld the District Court's injunction. *Id.* at 21a.

INTEREST OF THE *AMICI CURIAE* ELECTRIC UTILITY COMPANIES

The Utilities filing this brief as *amici curiae* will be vitally affected by the injunction. Each of the Utilities is licensed by the Nuclear Regulatory Commission to construct, own, or operate one or more nuclear reactors. Nuclear reactors depend for their operation on sufficient and timely supplies of enriched uranium. In this country, only DOE provides uranium enrichment services, and each of the Utilities currently has one or more contracts or options with DOE to have natural uranium enriched to become usable reactor fuel. DOE enrichment of foreign-origin uranium is expressly permitted by the criteria governing the terms and conditions under which the Department's enrichment services are made available. *See* 39 Fed. Reg. 38,016 (1974) (phasing out prior

[1] [Continued]

Kansas Electric Power Cooperative, Incorporated
Kansas Gas and Electric Company
Louisiana Power & Light Company
MSU System Services, Incorporated
New York Power Authority
Philadelphia Electric Company
Public Service Electric & Gas Company
Southern California Edison Company
Southern Company Services, Incorporated
System Energy Resources, Incorporated
Texas Utilities Electric Company
Toledo Edison Company
Union Electric Company
Virginia Power
Wisconsin Electric Power Company
Wolf Creek Nuclear Operating Corporation

restrictions on enrichment of foreign uranium). Accordingly, the Utilities, in reliance upon their enrichment contracts with DOE and the Department's ability to perform thereunder, have purchased or contracted to purchase hundreds of million dollars worth of foreign-origin uranium to meet their uranium enrichment obligations.

Unless this Court grants *certiorari* and reverses the decision below, the injunction will have severe repercussions for the Utilities and their customers. The injunction will abruptly and significantly frustrate the Utilities' commercial expectations. It will cause prices for natural uranium and enrichment services to rise, at home and abroad, just as the Utilities will be seeking to find alternative sources for both. Utilities that enter into alternative arrangements may still be saddled with their original contractual obligations. Some of the Utilities may not even be able to rearrange their supply and enrichment contracts in time to meet their immediate reactor refueling needs. In all cases, the consequential costs arising from the turmoil artificially induced by the injunction will be substantial, and such costs will be borne by the Utilities and their customers.

In contrast, there is no assurance whatsoever that the injunction will result in increased domestic production of uranium. Rather, it is more likely that there will be even less domestic production as DOE loses enrichment sales to its cheaper overseas competitors, and domestic utilities increase their reliance on both foreign uranium and foreign enrichment services. In short, the current plight of the domestic industry is not fairly traceable to uranium imports, but to long-term structural infirmities in the United States market. An injunction barring DOE enrichment of foreign uranium therefore could compound, not redress, the injuries alleged by Respondents.

The Utilities respectfully submit that this brief provides an important overview of the market disruptions into which both the Utilities *and* the domestic industry will be plunged as a consequence of the injunction. Although the Utilities believe that the opinions of the District Court and the Tenth Circuit, issuing and upholding the injunction, respectively, are plainly mistaken as a matter of law, the Utilities are even more firmly convinced that the injunction will be simply disastrous as a practical matter.

STATEMENT OF THE CASE

The Utilities adopt the Petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT'S INJUNCTION, AFFIRMED BY THE TENTH CIRCUIT, WILL HAVE IMMENSELY HARMFUL PRACTICAL CONSEQUENCES NOT OFFSET BY ANY SUBSTANTIAL BENEFIT TO RESPONDENTS.

A. The Injunction Will Cause The Utilities And Their Customers To Suffer Substantial Economic Penalties.

To leave in place the injunction affirmed by the Tenth Circuit will work a severe economic hardship on the Utilities and their customers. DOE's uranium enrichment criteria in effect at the time this lawsuit was initiated permitted the use of foreign-origin uranium to be phased in beginning in 1977. 39 Fed. Reg. at 38,016. Beginning in 1984, the criteria eliminated all restrictions on the enrichment of foreign uranium for domestic use. *Id.* at 38,017. The Utilities have relied on those criteria, and on their contracts with DOE that do not restrict the enrichment of imported uranium, to purchase, or contract for the purchase of, foreign uranium. As of January 1, 1985, U.S. utilities were estimated to hold contracts or options for natural uranium from foreign sources in 1985-1990 totaling 30.6 million pounds of U_3O_8—some $780 million worth. *See* Affidavit of Loring E. Mills, *filed*

in Western Nuclear, Inc. v. Huffman, 825 F.2d 1438 (10th Cir. 1987) (No. 86-1942) ("Mills Aff."), ¶ 3, *reprinted as* Appendix A hereto; Petition at 24 n.18.

Under the injunction, the Utilities will be unable to have the uranium they purchased or contracted to purchase abroad enriched pursuant to their contracts with DOE. The Utilities' obligations to their customers, however, will require them to take all necessary steps to obtain enough enriched uranium to continue operating their nuclear plants. Yet any of the alternatives the Utilities are forced to select in these circumstances "will result in significant adverse consequences in terms of increased costs and market disruption." Mills Aff. ¶ 6.

Utilities with foreign uranium under contract may elect to walk away from their DOE enrichment contracts and arrange for foreign enrichment services. This increased demand for foreign enrichment will drive up the price of such services. Moreover, as fewer utilities bring uranium to DOE for enrichment, DOE will have to raise the price of enrichment services to its remaining customers in order to comply with its statutory requirement to recover its costs. Mills Aff. ¶ 6(a); *see* 42 U.S.C. § 2201(v). Utilities with foreign uranium already on hand may attempt to purchase stockpiled domestic uranium from other utilities to enrich under their contracts with DOE. Such uranium will be hard to obtain as utilities hoard their supplies for the future, and it will command a premium when it is available. Mills Aff. ¶ 6(b). Finally, some utilities may seek to purchase newly-produced domestic uranium. The domestic industry, however, is not geared up to produce the amount of uranium that will be required. Rather, domestic producers are already importing foreign uranium for resale to U.S. utilities, because it is more economical than mining and milling additional quantities in this country. *See* 51 Fed. Reg. 27,132, 27,135 (1986). The domestic producers will certainly raise the price of any additional uranium they

do produce in order to cover their higher marginal costs—and to take advantage of the surge in demand created by the injunction. *See* Mills Aff. ¶ 6(c).

Any of these choices will take time to implement. Yet the injunction will take effect immediately, barring DOE from accepting foreign uranium for enrichment. "U.S. utilities with foreign uranium under contract and reactor refueling scheduled during the next 18 months may be unable to rearrange their contracts in time to meet their needs." Mills Aff. ¶ 7. At the same time, the domestic uranium industry presently lacks the production capacity to respond to the new fuel requirements of all operating domestic nuclear plants. *Id.* ¶ 9. For both reasons, some U.S. utilities could be forced to shut down temporarily and purchase or generate more costly replacement power. *Id.* ¶¶ 7, 9.

Thus, it is inevitable that the Utilities, pursuing any of the options available to them if the injunction takes effect, will end up with "duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both." Mills Aff. ¶ 10. Lengthy and expensive litigation over a host of contractual issues is sure to follow. *See id.* Furthermore, "[u]nder traditional principles of electricity rate regulation, the increased uranium costs, the increased price for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric rates and ultimately would be borne by the consumers of electricity." *Id.* ¶ 12.

These increased costs, which may be crippling in varying degrees to the Utilities and their customers throughout the country, are wholly unnecessary. This Court can prevent them by granting *certiorari* and reversing the decision below.

B. The Injunction Will Not Assure The Viability Of The Domestic Uranium Industry.

As the Petitioners have set forth in detail, *see* Petition at 4-12, the plight of the domestic uranium industry in the mid-1980's is the product of 40 years of legal, political, and commercial developments. The primary causes of the depressed U.S. uranium market are the unanticipated decline in the demand for nuclear power, the cancellation of power plants, the failure of domestic mining and milling companies to decrease uranium production in response to the decrease in consumption, the build-up of utility inventories of natural and enriched uranium, and the emergence of secondary and foreign markets for both natural and enriched uranium.

Imports of foreign uranium have *not* been the major cause of the domestic industry's financial problems. No less an expert on trade matters than the United States Trade Representative has so determined, in response to a request by the Secretary of DOE to investigate the advisability of initiating a legal action to restrict uranium imports pursuant to section 2210b(d).[2] The Trade Representative counseled against such an action, based on his conclusion that the economic difficulties experienced by the domestic industry are the result of long-term market forces and cannot be alleviated by restricting DOE's enrichment of foreign uranium. Letter from U.S. Trade Representative Clayton Yeutter to DOE Secretary John S. Herrington (Dec. 26, 1985).[3]

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[2] The statute authorizes the Secretary to determine whether uranium imports constitute "a substantial cause of serious injury, or threat thereof," to the domestic industry. 42 U.S.C. § 2210b(d) (1982). By requesting the Trade Representative to conduct a preliminary injury determination, the Secretary fully discharged his responsibilities in these circumstances. *See* 51 Fed. Reg. at 27,135.

[3] The Trade Representative's conclusion, of course, is the product of expert judgment which carries a presumption of validity. *Cf. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Puerto Rico Maritime Shipping Authority v. FMC*, 678 F.2d 327, 335 (D.C. Cir.), *cert. denied*, 459 U.S. 906 (1982).

Although foreign-origin uranium has captured an increasing share of the domestic market over the past few years, this trend has been a symptom, rather than a cause, of the weaknesses of the U.S. uranium industry. The serious decline of the domestic uranium industry was evident as early as 1981, yet as of 1981 less than ten percent of the uranium delivered to DOE for enrichment was of foreign origin. *See Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports, Hearing Before the Subcomm. on Energy Research and Development of the S. Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 1-21, 41-45, 120-123 (1981). Further, more than 37% of the foreign-origin uranium under contract for delivery to the United States between 1985 and 1990 has been contracted for by domestic uranium producers who have chosen to purchase uranium abroad for resale instead of producing it themselves. 51 Fed. Reg. at 27,135. This outsourcing, as well as the increase in uranium imports generally, is attributable to the simple fact that higher grade ore and lower production costs make it possible to buy foreign uranium for less than what it costs to produce domestic uranium. *Id.*

In these circumstances, requiring DOE to restrict its enrichment services for foreign-origin uranium will not address the fundamental, long-term weaknesses of the domestic industry. In fact, as the Department confirmed during its recent rulemaking on revised enrichment criteria,[4] restrictions on the enrichment of imported ura-

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[4] Subsequent to the initiation of this lawsuit, DOE commenced a rulemaking to revise the enrichment criteria in response to market changes and the depressed condition of the domestic industry. 51 Fed. Reg. at 3625. Nevertheless, no restrictions on the enrichment of foreign uranium were included in the final revised criteria adopted by the Department, based on the Secretary's conclusion that "restrictions would [not] assure the viability of the domestic mining and milling industry." 51 Fed. Reg. at 27,135. *See* Petition at 11-13, 13 n.10.

nium "could further damage the U.S. mining industry," 51 Fed. Reg. at 3627, and thus would be "counterproductive." 51 Fed. Reg. 15,632 (1986). If such restrictions take effect under the injunction, DOE's enrichment services will become less competitive in the world market. That, in turn, will trigger a loss of enrichment sales by DOE, and the viability of the domestic mining industry will be jeopardized all the more.

Even in the short term, an injunction against the enrichment of foreign uranium will hardly benefit the domestic industry. As previously discussed, *see supra*, pp. 6-7, an injunction will not result in an immediate increase in domestic uranium production: The domestic mining and milling companies lack the present capacity to respond to a sudden increase in demand. Instead, U.S. utilities will turn to foreign enrichment or purchase stockpiled domestic uranium to meet their consumption requirements. Furthermore, those domestic producers who have purchased foreign-origin uranium for resale in this country may be just as adversely affected as their utility company customers by an injunction barring DOE enrichment of such imports.

II. THE INJUNCTION REPRESENTS AN IMPROPER JUDICIAL INTRUSION INTO AGENCY RULEMAKING.

The decisions below repudiate the deference properly due to a reasonable statutory interpretation by the agency charged with administering the law. Further, the injunction issued by the District Court and affirmed by the Tenth Circuit is the product of unlawful judicial rulemaking that undermines the division of power inherent in the Constitution and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1982). This Court should grant *certiorari* in order to restore that balance of power and to vindicate the principle that federal appellate review is intended to scrutinize, but not substitute for, agency decision-making.

A. The Decisions Below Contravene The Standard This Court Has Set For Review Of Agency Decisions.

This case is governed by well-settled principles of statutory construction and appellate review of agency decisions: the plain meaning of a statute must be enforced, and if it is ambiguous, a permissible construction by the agency entrusted to administer the law is entitled to "considerable weight." *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-845 (1984). *Accord American Paper Institute v. American Electric Power Service*, 461 U.S. 402, 423 (1983); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical Workers*, 367 U.S. 396, 408 (1961). Even if the meaning is not plain, however, a court may not substitute its own interpretation for that issued by an agency merely because there are several plausible ways to view the statute's meaning. *Chevron U.S.A.*, 467 U.S. at 843 & n.11. Rather, so long as the agency has reasonably sought to implement the statute in a manner that Congress has not proscribed, its interpretation must be upheld. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Chevron U.S.A.*, 467 U.S. at 843-845 & nn.11-14; *Batterton v. Francis*, 432 U.S. 416, 426 (1977).

The plain meaning of section 2201(v) is that restrictions on enrichment of foreign-origin uranium are required only when they are necessary to maintain a viable domestic uranium industry. If the industry will not benefit from the restrictions, they can hardly be necessary. That is precisely how the Department analyzed section 2201(v):

> The plain language of the statute makes clear the restrictions are not to be imposed for their own sake. Rather, DOE has a duty to determine whether their imposition would achieve the statutory objective of assuring the viability of the domestic industry. And,

> when DOE determines imposition would have a meaningless or counterproductive effect on this objective, DOE should not, and indeed, cannot impose restrictions.

51 Fed. Reg. at 15,632. Any other interpretation of the statutory language—for example, to require DOE to restrict the enrichment of imported uranium when such action would *not* help the domestic uranium industry—is absurd and could not have been intended by Congress. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 392 n.158 (D.C. Cir. 1979) (opinion of Robinson, J.) (absurd construction of a regulatory statute is to be avoided if at all possible); *New York State Commission on Cable Television v. FCC*, 571 F.2d 95, 98 (2d Cir.) ("The appropriate methodology, then, is to look to the 'common sense' of the statute or regulation, to its purpose, to the practical consequences of the suggested interpretations, and to the agency's own interpretation for what light each inquiry might shed"), *cert. denied*, 439 U.S. 820 (1978).

Thus, the failure of the courts below to sustain DOE's construction of section 2201(v) and DOE's well-considered decision not to issue criteria barring the enrichment of foreign uranium constitutes clear legal error. *See Young v. Community Nutrition Institute*, 476 U.S. 974 (1986) (upholding agency's statutory construction and decision not to promulgate regulations).

B. The Decisions Below Arrogate The Roles Congress Intended Both For The Department Of Energy And Itself.

Section 2201(v) requires DOE to establish written criteria setting forth the extent to which the Department's enrichment services will be made available for imported uranium. Further, it requires DOE to submit its proposed criteria to Congress for a 45-day review period before they can take effect. Thus, even if a court

ruled that DOE interpreted section 2201(v) incorrectly, the only proper remedy would be for that court to order the Department to issue criteria specifying the extent to which new restrictions on enrichment of foreign uranium would apply. *Cf. Burlington Northern Inc. v. United States*, 459 U.S. 131, 141 (1982) ("federal-court authority to reject [Interstate Commerce] Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 545 (D.C. Cir. 1983) (to vacate an agency's new rule without reinstating the old rule "avoids any problem of the [appellate] court overstepping its authority, and leaves it to the agency to craft the best replacement for its own rule"). Instead, by enjoining DOE to impose specific limits on its enrichment of foreign uranium, the courts below not only have ousted the Department of its primary jurisdiction over the promulgation of enrichment criteria, but they also have deprived Congress of its role in scrutinizing and approving the criteria. Such actions constitute unlawful judicial rulemaking, which this Court should not leave unreviewed.

At the time Respondents initiated this lawsuit, the Department's existing criteria had phased out all restrictions on DOE enrichment of foreign uranium as of January 1, 1984. *See* 39 Fed. Reg. at 38,017; 38 Fed. Reg. 12,180 (1973). Having failed to seek judicial review of the criteria when they were adopted, Respondents may not do so now—directly, or collaterally by seeking an injunction to prevent the enrichment of foreign uranium. *See Baylor University Medical Center v. Heckler*, 758 F.2d 1052, 1058 (5th Cir. 1985); *Independent Bankers Association v. Heimann*, 627 F.2d 486, 488 (D.C. Cir. 1980); *Nader v. NRC*, 513 F.2d 1045, 1054-55 (D.C. Cir. 1975).

More importantly, the District Court's willingness to issue such an injunction and the Tenth Circuit's willing-

ness to affirm it represent improper judicial encroachments into administrative rulemaking. The injunction effectively substitutes the judiciary's own enrichment criteria for those lawfully issued by DOE. "Such usurpation of administrative power . . . ill serve[s] the orderly operation of the federal government. Nor [does] such action pay proper respect to the division of power inherent in the Constitution and the Administrative Procedure Act, ..." *Colorado Public Interest Research Group v. Hills*, 420 F. Supp. 582, 586 (D. Colo. 1976). *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 557 (1978) (condemning "judicial intervention run riot").

For the same reason, the injunction too readily deprives the Department of its primary jurisdiction over the issuance of enrichment criteria, even where the courts found fault with the absence of new criteria restricting enrichment of foreign uranium. The courts, while retaining the final authority to expound a statute, are required to avail themselves of the aid implicit in the agency's superior expertise concerning the subject matter in question. *See Conrail v. National Association of Recycling Industries*, 449 U.S. 609, 612 (1981); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973). The authority to promulgate uranium enrichment services criteria was delegated by Congress, with good reason, to DOE, not to a federal court.

Section 2201(v) contains the 45-day review period requirement to ensure that any uranium enrichment criteria proposed by DOE become "subject to Congressional scrutiny." S. Rep. No. 1325, 88th Cong., 2d Sess. 16, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3105, 3120. By changing the effective enrichment criteria immediately, the injunction circumvents the process of scrutiny and approval that Congress expressly reserved for itself.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, the writ of *certiorari* should be granted.

Respectfully submitted,

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November 1987

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH DISTRICT

No. 86-1942

WESTERN NUCLEAR, INC., et al.,
Plaintiffs-Appellees,

v.

F. CLARK HUFFMAN, et al.,
Defendants-Appellants.

AFFIDAVIT IN SUPPORT OF STAY
PENDING APPEAL

DISTRICT OF COLUMBIA) ss.-

LORING E. MILLS, being duly sworn, says:

1. I am Vice President, Nuclear Activities of Edison Electric Institute ("EEI"). I make this affidavit in support of the motion filed by appellants for a stay pending appeal of the injunction contained in the order issued by District Judge Carrigan on June 20, 1986.

2. EEI is the national association of the nation's investor-owned electric companies, with offices at 1111 19th Street, N.W., Washington, D.C., 20036. EEI's mem-

bers serve approximately 73 percent of all electricity customers in the nation. They operate 85 nuclear plants and currently have 16 additional units under construction. These nuclear utilities are the majority of the domestic uranium enrichment customers of the Department of Energy ("DOE"). Part of my job with EEI is to gather and review data and information concerning the supply of, and demand for, natural uranium and enrichment services by U.S. utilities that own and operate nuclear power plants. Such data and information are available to EEI from individual nuclear utilities or obtained from publicly-available sources, including defendant-appellant DOE.

3. The estimated total of existing contracts or options held by U.S. utilities and U.S. uranium suppliers for natural uranium from foreign sources as of January 1, 1985 was as follows:

Year	U.S. Utility Contracts With Foreign Producers	U.S. Uranium Supplier Contracts For Foreign Uranium	Total Amount From Foreign Producers (Million Pounds U_3O_8)
1985	5.4	4.5	9.9
1986	5.4	2.8	8.2
1987	4.9	4.0	8.9
1988	4.9	2.4	7.3
1989	4.5	2.4	6.9
1990	5.5	2.1	7.6

Source: Energy Information Administration, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment*, DOE/EIA-0477 ("1984 EIA Report") at p. 11, Table I.

In addition, at year-end 1984 there were approximately 29.2 million pounds U_3O_8 equivalent of foreign unenriched uranium in process in the United States. Energy Information Administration, *Uranium Industry Annual 1984*, DOE/EIA-0478(84) at p. 82, Table 42. Data for calendar year 1985 have not yet been published.

4. It is important to note that over 37 percent of the foreign uranium under contract for 1985-90 delivery was contracted for by domestic suppliers. Those suppliers, several of which hold domestic uranium reserves, choose to acquire uranium abroad and sell it to the U.S. utilities rather than produce uranium from their domestic reserves to meet the utilities' requirements. It is clearly unfair to have an injunction that will require the utilities to renegotiate their uranium supply contracts, at premium prices, for domestic uranium with the same domestic producers who elected to deliver foreign uranium to begin with, instead of producing domestic uranium.

5. Certain U.S. nuclear utilities also have contracts for the enrichment of uranium outside thhe United States. However, most U.S. utilities have chosen to rely on DOE for enrichment services. As a result of a free world surplus of capacity for uranium enrichment, it is estimated that there is presently available uncommitted foreign enrichment capacity of approximately 5,000,000 separation work units ("SWUs") per year, enough to enrich all the foreign origin uranium now under contract or option to U.S. utilities.

6. If this Court does not stay the injunction pending appeal, U.S. nuclear utilities will be forced to choose among several unattractive options to ensure a sufficient amount of enriched uranium to continue operation of their nuclear plants. Pursuing any of these options, or a combination, will result in significant adverse consequences in terms of increased costs and market disruption. The options that U.S. utilities are likely to pursue include:

a. Utilities with foreign uranium under contract will consider seeking foreign enrichment services and may choose to do so for all or only a part of their foreign uranium, abrogating their existing enrichment contracts

with DOE. While the price of foreign enrichment services is currently competitive with DOE, a sudden surge of demand can reasonably be expected to result in increased prices for overseas enrichment. The corresponding loss by DOE of enrichment volumes will result in an increase in the price of domestic enrichment as well, because of the statutory requirement for recovery of costs by DOE.

b. Utilities with foreign uranium that are obligated to receive enrichment services under their DOE contracts will be forced to try to purchase domestic uranium that is currently stockpiled by others to substitute for their foreign uranium. However, the domestic uranium that is stockpiled by U.S. utilities probably will not be made available to utilities in need because the injunction will cause utilities with an ample supply of domestic uranium to keep it for their own future needs. If sufficient domestic uranium can be obtained, the result will be redundant purchases of uranium that will cause a serious cash flow problem for those utilities that are forced both to honor their contracts for foreign uranium and to purchase supplies of domestic uranium. This will be exacerbated by the sudden increase in demand for domestic uranium, resulting in higher prices than would be expected in a normal market with supply and demand at or near equilibrium.

c. Utilities could attempt to purchase newly-produced domestic uranium, but they will find that the present U.S. producing capacity is severely restricted in the short run. As shown in paragraphs 3 and 4, many U.S. producers are importing supplies of foreign uranium for resale to U.S. utilities for domestic end use. Any amounts that could be produced above already-contracted capacity would undoubtedly command a premium price.

7. Pursuing one or more of the foregoing options will take time. Because the injunction is immediately effective, U.S. utilities with foreign uranium under contract

and reactor refueling scheduled during the next 18 months may be unable to rearrange their contracts in time to meet their needs. Such utilities would be forced to shut down temporarily and purchase or generate more costly replacement power.

8. It must be remembered that a utility cannot simply purchase natural uranium as U_3O_8 and deliver it to DOE for enrichment. The uranium must first be converted to uranium hexafluoride (UF_6). A major conversion facility, the Sequoyah plant owned by Kerr-McGee, is currently shut down because of an accident, and the restart of the plant has been delayed by the Nuclear Regulatory Commission for an indeterminate period. Those utilities that have foreign uranium which has already been converted to UF_6 and is ready for delivery to DOE will be required by the injunction to purchase domestic U_3O_8 and contract for its conversion to UF_6. This will create a backlog at the one remaining conversion facility that is operating in the United States, delaying delivery of UF_6 to DOE. Meanwhile, the already converted UF_6 will be stockpiled, unavailable for use, and the utilities will be required to pay twice for the needed conversion service.

9. There is considerable doubt that the fuel requirements of all of the operating nuclear plants can be physically achieved under the injunction, because of the lack of currently available production and conversion capacity. This also could result in utilities being forced to shut down temporarily and rely upon more expensive replacement power.

10. Action by U.S. utilities to pursue one or more of the options previously discussed will necessarily result in most utilities winding up with duplicative, overlapping, or conflicting contracts for uranium supplies or enrichment services or both. Utilities presumably will take the position that certain contracts are void because of the injunction or that the orders of the District Court con-

stitute *force majeure* relieving them of their obligations. Such claims may or may not be accepted by suppliers. Either lengthy and expensive litigation or the payment of termination charges or damage claim settlements will likely be required to resolve the status of the contracts.

11. The additional costs to the utilities resulting from efforts to secure alternate and in some cases duplicative sources of supply, and to obtain a legal determination of their obligations under their previous contracts, obviously cannot be quantified ahead of time. The distribution of costs will vary significantly, depending upon the contractual status of a particular utility. Utilities that are committed to foreign sources of uranium supply can expect to experience sharply increased costs either as a result of increased foreign enrichment prices or, if they continue to seek enrichment services from DOE, as a result of the cost of purchasing domestic uranium supplies, most likely at an inflated price. Moreover, as fewer utilities seek enrichment services from DOE, DOE will be forced to increase the price of enrichment services to its remaining customers to meet its congressionally-mandated obligation to recover appropriate Government costs.

12. Under traditional principles of electricity rate regulation, the increased uranium costs, the increased prices for enrichment services, and the costs of abrogating existing contracts will all be incorporated in electric rates and ultimately would be borne by the consumers of electricity.

13. In summary, if the injunction is not stayed pending appeal, there will be an immediate, severe disruption in the cost and availability of enriched uranium needed to produce electricity. The costs will be millions of dollars in the next few months and could be several hundred millions of dollars within the next few years. The dollar costs, direct and indirect, will be borne by the U.S. utili-

ties and the electric ratepayers. If the District Court's injunction is later reversed on appeal, the utilities will have no way to recover those costs. The harm that will be caused by the injunction is truly irreparable.

/s/Loring E. Mills
LORING E. MILLS

Sworn to before me
on July 10, 1986

/s/ Michael J. Tobin
Notary Public